No. 76-549

In the

Supreme Court of the United States

OCTOBER TERM, 1976

SKIL CORPORATION,

Petitioner,

vs.

MILLERS FALLS COMPANY,
ROCKWELL MANUFACTURING COMPANY,
WEN PRODUCTS, INC.,
and
LUCERNE PRODUCTS, INC.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Foreword

This memorandum is in reply to the Respondents' Brief in Opposition.[1]

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[1] References herein to the Respondents' Brief In Opposition are in the form "(Resp. Br., p. 5)".

Respondents' Statement Of The Case Is Irrelevant And Misleading

The ostensible reason for discussing the other litigation involving some of the parties is the order of the district court below purporting to consolidate the instant action, C74-121, with another civil action, C69-461. Of course, if it is determined by this Court that the Ohio court does not have jurisdiction over the C74-121 case, the order of consolidation is a nullity. *Ferri* v. *United Aircraft Corp.*, 357 F. Supp. 814, 818 (D. Conn., 1973). At any rate, this other litigation involving patents owned by one of the respondents is not germane to the issues set forth in our petition for the writ of certiorari.

Although the issues of validity and infringement of Skil's patent are not involved in the present petition, a reading of our opponents' memorandum (Resp. Br., p. 2) might leave one with the impression that the patent has been adjudicated invalid. Just to set the record straight, petitioner's Gawron patent was held valid by the Seventh Circuit in *Skil Corp.* v. *Cutler-Hammer, Inc.*, 412 F.2d 821 (1969).

It Was Improper For The Sixth Circuit To Assume That The Seventh Circuit Had Reached The Merits

The respondents assert that no authority has been cited for the proposition that the Seventh Circuit's two sentence order, unaccompanied by a written opinion, cannot be a decision on the merits (Resp. Br., p. 7). In the first place, the respondents in making this argument have apparently overlooked a host of such authorities set forth by Judge Adams in his dissenting opinion (17a-19a).[2] In

[2] References herein to the appendix attached to the petition are in the form "(17a)".

the second place, it is not so much the two sentence aspect of the order which was not accompanied by an opinion, but rather the nature of the proceedings in which the order was issued, viz., mandamus proceedings in which the most common practice of the Seventh Circuit is to rule without reaching the merits. *Chemetron Corp.* v. *Perry*, 295 F.2d 703 (7th Cir., 1961).

Our opponents, in an attempt to cite authorities to the contrary, call attention to *Nappa Valley Electric Co.* v. *R. R. Comm.*, 251 U.S. 366 (1920). That decision is clearly wide of the mark as there this Court was interpreting a provision of §67 of the Public Utilities Act of the State of California dealing with the manner in which the supreme court of that state could review orders of the Public Utilities Commission. Even more inapposite to the case at bar is *Williams* v. *North Carolina*, 325 U.S. 226 (1945), also relied on by respondents (Resp. Br., p. 8). Needless to say, the Full Faith and Credit Clause of the Constitution does not apply to orders of coordinate courts within our federal judicial system.

Petitioner Is Not Estopped To Raise The Questions Here—It Had No Right Of Appeal To Review The Transfer Order

Respondents' estoppel theory is apparently based on the faulty notion that Skil "abandoned its *appeal* rights" (Resp. Br., p. 9) in the Seventh Circuit prior to transfer.[3] If one thing is settled with respect to §1404(a) orders, it is that an appeal will not lie from entry of such an order. *Sypert* v. *Miner*, 266 F.2d 196, 199 (7th Cir., 1959), *cert.*

[3] Respondents make two other references to Skil's alleged right of appeal before the Seventh Circuit (Resp. Br., pp. 7, 11).

den. 361 U.S. 832 (1959); *A. Olinick & Sons* v. *Dempster Bros., Inc.,* 365 F.2d 439, 442 (2nd Cir., 1966). This reason at least renders *Angel* v. *Bullington,* 330 U.S. 183 (1947), relied upon by respondents (Resp. Br., p. 9), irrelevant to the facts of the case at bar. In this regard, it was noted in the *Angel* case that Bullington had the right of appeal to this Court from the decision of the North Carolina Supreme Court (*Id.,* at 330 U.S. 189); Bullington did not exercise that right but instead instituted new proceedings in the federal district court.

The Blaski And Continental Grain Cases Have Not Been Differentiated

The respondents' quotations from the *Blaski* decision (Resp. Br., pp. 10, 11) certainly do not serve to differentiate that case. We will not extend this reply brief with a further discussion showing why the majority of the Sixth Circuit in the case at bar acted in a manner contrary to this Court's decision in *Hoffman* v. *Blaski,* 366 U.S. 335 (1960), but rather will only invite this Court's attention to our petition for a discussion on this point.

In responding to our opponents' assertion (Resp. Br., p. 11) that the decision of *Continental Grain Co.* v. *Barge, FBL-585,* 364 U.S. 19 (1960) is not relevant, we shall make the single point here that the transfer could have been sanctioned only under some rationale extending the holding of that decision and that the Sixth Circuit acted improperly in *assuming* that the Seventh Circuit had reached the merits and authorized the transfer based on such a theory. For the several reasons why this assumption by the Sixth Circuit was not warranted, we again refer to the illuminating dissenting opinion of Judge Adams (17a-19a).

Section 1404(a) Is Involved

The respondents' notion (Resp. Br., p. 11) that §1404(a) is not involved is clearly absurd. In any motion to remand a case transferred under this change-of-venue statute, the transferee court must necessarily determine whether or not the action was properly transferred in the first place under §1404(a). Accordingly, the provisions of that statute come into play on a remand motion. *Starnes* v. *McGuire,* 512 F.2d 918, 924 (C.A. D.C., 1974); *Ferri* v. *United Aircraft Corp., supra,* p. 818.

The Ends Of Justice Are Not Served When Courts Act Beyond Their Authority

Our opponents make reference to the time-honored saying that "justice delayed is justice denied" (Resp. Br., p. 9). As a rejoinder, we quote from Judge Adams' dissenting opinion in the instant case:

> "Though it may inconvenience the parties, and vex the Court, to delay further this lengthy litigation by requiring a remand to the Northern District of Illinois, it may prove even more frustrating and time-consuming in the long run to have a costly and prolonged trial aborted on appeal because of jurisdictional error." (20a).

Here, the majority of the Sixth Circuit, in the interest of terminating this complex litigation, has glossed over a basic issue of jurisdiction by improperly invoking the doctrines of res judicata and law of the case. But as Judge Adams stated—". . . a court can not act beyond its powers, and the authority of the Ohio district court to assume jurisdiction over this action is not apparent on the record before us." (23a).

Conclusion

The respondents have come forward with no arguments militating against the several reasons we have set forth as justifying issuance of the writ. This Court should issue the writ of certiorari and decide the important questions of federal procedure raised in our petition.

Respectfully submitted,

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